# STATE OF MICHIGAN

# COURT OF APPEALS

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| TERESA BONGIOVANNI,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>September 23, 2010 |
| v | No. 292326<br>Oakland Circuit Court |
| CITY OF CLAWSON,<br><br>Defendant-Appellant. | LC No. 2008-092786-NO |

Before: WILDER, P.J., and CAVANAGH and M. J. KELLY, JJ.

PER CURIAM.

In this suit to recover damages sustained after a trip and fall, defendant City of Clawson (the City) appeals as of right the trial court's order denying its motion to dismiss plaintiff Teresa Bongiovanni's claim under MCR 7.216(C)(7) and (C)(10). On appeal, the City argues that the trial court erred in several ways when it denied the City's motion for summary disposition. Because we conclude that the trial court did not err when it denied the City's motion, we affirm.

## I. BASIC FACTS AND PROCEDURAL HISTORY

In July 2007, Bongiovanni lived with her stepfather at a home located along a residential street in the City of Clawson. The street was concrete rather than asphalt. On the night of July 13, Bongiovanni drove home and parked her car across the street from her stepfather's house. She got out of her car and began to cross the street to her home. As she was walking in the street, she tripped over a raised flag of concrete, fell sharply, and fractured her elbow. Pictures show that the flag of concrete in the street had risen to approximately 1 and 5/8 inches above the surface of the adjacent flag. Although she and her stepfather had probably driven over the raised flag of concrete many times, neither she nor her stepfather were aware of the discontinuity prior to the accident and could not state when it might have first appeared.

In July 2008, Bongiovanni sued the City for failing to keep the street in reasonable repair, which failure she alleged proximately caused her injuries. In February 2009, the City moved for summary disposition under MCR 2.116(C)(7), (C)(8), and (C)(10). In its motion, the City argued that dismissal was appropriate because Bongiovanni had not rebutted the statutory presumption that the street was in reasonable repair because the discontinuity defect at issue was less than 2 inches in height. See MCL 691.1402(a). The City also argued that dismissal was appropriate because the evidence showed that the street was in reasonable repair for vehicular traffic and because there was no evidence that the City had knowledge of the defect as required

by MCL 691.1403. The trial court rejected each of these arguments and denied the City's motion in April 2009. The City moved for reconsideration of the order denying its motion for summary disposition in May 2009 and the trial court denied that motion in the same month.

The City now appeals as of right. See MCR 7.202(6)(v) and MCR 7.203(A)(1).

## II. SUMMARY DISPOSITION

### A. STANDARDS OF REVIEW

On appeal, the City argues that it was entitled to the dismissal of Bongiovanni's claim on several grounds and, for that reason, the trial court erred when it denied the City's motion for summary disposition. Specifically, the City argues that it was entitled to summary disposition because Bongiovanni failed to rebut the presumption that the street was in reasonable repair, failed to present evidence that it was not suitable for vehicular travel, and failed to present evidence that the City had the required notice of the defect. Finally, the City also argues that the trial court should have dismissed Bongiovanni's claim because she was not within the class of persons to whom the City owed any duty of care. This Court reviews de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). This Court also reviews de novo the proper interpretation of statutes such as the governmental tort liability act. *LaMeau v Royal Oak*, ___ Mich App ___, ___; ___ NW2d ___ (2010).

### B. THE TWO-INCH RULE

Governmental agencies such as the City are generally immune from tort liability while engaged in the exercise or discharge of a governmental function. See 691.1407(1). However, there are exceptions to the immunity. One such exception imposes a duty on governmental agencies that have jurisdiction over a highway to "maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel." MCL 691.1402(1). In this case, there is no dispute that the City has jurisdiction over the street at issue. However, the City argues that it is not liable for the discontinuity defect under the so called "two-inch rule."

Although what constitutes reasonable repair will often depend on the facts of the particular case, the Legislature has established a presumption of reasonable repair for discontinuity defects: "A discontinuity defect of less than 2 inches creates a rebuttable inference that the municipal corporation maintained the sidewalk, trailway, crosswalk, or other installation outside of the improved portion of the highway designed for vehicular travel in reasonable repair." MCL 691.1402a(2). In this case, the City argues that, because the concrete flag at issue was less than two inches higher than the adjacent flag, Bongiovanni had to present evidence that the condition was "unusually or specifically dangerous." And, because Bongiovanni did not present such evidence, the City maintains, the trial court should have dismissed her suit. We do not agree that the trial court misapplied MCL 691.1402a(2) to the facts of this case.

As our Supreme Court recently explained, MCL 691.1402a(2) applies only to county highways. *Robinson v Lansing*, 486 Mich 1, 21-22; 782 NW2d 171 (2010). It is undisputed that the street involved here is not a county highway; therefore, MCL 691.1402a(2) does not apply. Even if we were to conclude that the statute applied to this street, by its plain terms the statute

establishes the presumption with regard to a "sidewalk, trailway, crosswalk, or other installation outside of the improved portion of the highway designed for vehicular travel." MCL 691.1402a(2). Here, Bongiovanni's injuries did not arise from the City's failure to keep a sidewalk, trailway, crosswalk, or other installation outside of the improved portion of the highway in reasonable repair. For these reasons, we cannot conclude that the trial court erred when it refused to dismiss Bongiovanni's claims on this basis.

C. NOTICE

The City also argues that the trial court should have dismissed Bongiovanni's claim because there was no evidence that the City had the notice required under MCL 691.1403. The Legislature provided that no governmental agency can be held liable "for injuries or damages caused by defective highways unless the governmental agency knew, or in the exercise of reasonable diligence should have known, of the existence of the defect and had a reasonable time to repair the defect before the injury took place." MCL 691.1403. However, the Legislature also established that knowledge and opportunity to repair may be conclusively presumed under certain circumstances: "Knowledge of the defect and time to repair the same shall be conclusively presumed when the defect existed so as to be readily apparent to an ordinarily observant person for a period of 30 days or longer before the injury took place." *Id.*

In response to the City's motion for summary disposition, Bongiovanni presented the deposition testimony of an expert engineer, Theodore Dziurman, who opined that the defect had to have existed for some period of time. He explained that the photos of the defect showed that the "joint material was not visible" and that it had to have vanished over time. From that, he concluded that the defect had to have been in existence for more than 30 days and when asked if he was sure he responded that he was "very emphatic about that." Further, the photo evidence shows that the defect was such that it would be readily apparent to an ordinarily observant person under normal conditions. This evidence established a question of fact as to whether the City had the required notice and, for that reason, the trial court properly declined to grant summary disposition on that basis. See *LaMeau*, ___ Mich App at ___ (noting that summary disposition under MCR 2.116(C)(7) is appropriate only where there is no question of fact as to whether governmental immunity applies).

D. REASONABLE REPAIR

The City also argues that the trial court should have dismissed Bongiovanni's claim because there was no evidence that the defect at issue posed a danger to vehicular traffic. However, contrary to the City's contention, the statute imposes a duty to maintain highways in reasonable repair for *public travel* rather than for vehicular travel. MCL 691.1402(1). And Michigan courts have long recognized that the duty to keep highways in reasonable repair extends to pedestrian travel. See, e.g., *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 162-170; 615 NW2d 702 (2000).

Further, the evidence cited by the parties in support of their respective positions on summary disposition clearly established a question of fact as to whether the street was kept in reasonable repair for public travel. Dziurman testified that, even though the discontinuity did not constitute a hazard for vehicles, it is a hazard for other forms of travel such as for pedestrians,

cyclists, and skateboarders. He also stated that, even if Bongiovanni had been looking down on the night in question, she would not have been able to see the defect because there was inadequate street lighting. Dziurman also noted that there was no visible sign of sealing, which indicates a lack of maintenance. He concluded that, overall, the street was not reasonably safe for public travel at night. Given this evidence, the trial court did not err when it refused to dismiss Bongiovanni's claim on the basis that there was no evidence that the street was not in reasonable repair.

## E. DUTY

Finally, the City argues that it has no duty to Bongiovanni because she was not an intended and permitted user of the street. We note that this issue was not properly preserved for appellate review because the City did not raise this argument in its motion for summary disposition. As a result, Bongiovanni did not have the opportunity to identify factual and legal support for her position before the trial court and this Court does not have the benefit of the trial court's analysis of the issue. As our Supreme Court has explained, in civil cases, Michigan courts generally follow a "raise or waive" rule of appellate review. *Walters v Nadell*, 481 Mich 377, 387-388; 751 NW2d 431 (2008). Further, although this Court has the discretion to review unpreserved claims of error under certain circumstances, see *Smith v Foerster-Bolser Constr*, 269 Mich App 424, 427; 711 NW2d 421 (2006), under the procedural posture of this case, we decline to exercise our discretion to review this issue. This issue can best be addressed in the first instance by the trial court after a hearing where the parties will have a full and fair opportunity to present factual as well as legal support for their respective positions.

There were no errors warranting relief.

Affirmed. As the prevailing party, Bongiovanni may tax costs. MCR 7.219(A).

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Michael J. Kelly